Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D–02–427 OF 2004
RICHARD MALANJUM, TENGKU BAHARUDIN SHAH JJCA AND AZMEL J
28 FEBRUARY 2005

Civil Procedure — Stay of proceedings — Application — Allegation that judge was biased — Whether proper for presiding judge to decide on own bias — Whether application for stay should be granted

Civil Procedure — Stay of proceedings — Application — Pending appeal — Original application for stay made to Court of Appeal only — Whether Court of Appeal had jurisdiction to entertain application for stay — Courts of Judicature Act 1964 s 44(1)

The defendant was owned by the PAS-led Government of the state of Kelantan. The defendant had applied for the learned Judicial Commissioner at High Court ('the JC') to recuse himself from hearing the case involving the defendant. It was alleged that due to the JC's previous dealings with the United Malay National Organisation (UMNO), there would be a possibility of bias if the learned JC were to hear the case. The learned JC ruled that there were no merits in the application and therefore decided not to recuse himself from hearing the case as he completely believed he could conduct the case free of any bias whatsoever. Against that decision, the defendant had lodged an appeal to the Court of Appeal. The defendant applied for a stay of the proceedings of the matter pending the decision of the appeal. The stay was not applied at the High Court but instead the application was made only at the Court of Appeal. The issue was whether the original application could be entertained by the Court of Appeal. Counsel for the applicant submitted that this court had the jurisdiction to hear the application by virtue of s 44 of the Courts of Judicature Act 1964. The second issue was whether the stay should be allowed.

Held, allowing the application for stay of proceedings:

(1) Based on the clear wording of s 44(1) of the Courts of Judicature Act 1964, this court (ie the Court of Appeal) had the authority to entertain such application. An appeal against the decision of the learned JC was pending in this court. This was an interim application pending the hearing of the appeal (see para 6).

(2) In an application for a stay of proceedings the applicant must show the existence of special circumstances (see para 12); *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 not followed; *Kosma*

Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257 and *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116 followed.

(3) This case came under the category of non-automatic disqualification. Hence there was a need to prove whether the element of bias exists. It has to be objectively decided, based on all the facts and circumstances of the case. The more important question to be asked was whether it was proper for such decision to be made by the presiding judge against whom bias has been alleged. When a party alleges that a presiding judge is biased, and if the presiding judge himself decides he is not, such decision would infringe the rule of natural justice in that 'one should not be a judge in one's own cause'. This situation would come within the meaning of special circumstances (see para 13). Also in the event that a stay a proceedings was not granted and the learned JC be allowed to proceed with the hearing of this case, it would result in a waste of time and effort by all persons involved since if the Court of Appeal allows the appeal, the whole proceedings conducted by the learned JC would have to be completely expunged. In the circumstances it would be more expedient to allow a stay of the proceedings until the hearing of the appeal has been completed (see para 14).

[**Bahasa Malaysia summary**

Defendan dimiliki oleh kerajaan Negeri Kelantan di bawah pimpinan PAS. Defendan telah memohon kepada Pesuruhjaya Kehakiman ('PK') untuk menarik diri daripada mendengar pembicaraan kes yang melibatkan defendan. Adalah disyaki oleh kerana PK pernah berurusan dengan United Malay National Organisation (UMNO), ada kemungkinan PK akan berat sebelah jika mendengar pembicaraan kes tersebut. PK memutuskan bahawa tidak ada merit dalam permohonan dan tidak menarik diri daripada mendengar pembicaraan kes kerana yakin bahawa beliau dapat mendengar kes tersebut tanpa sebarang kecenderungan. Defendan menentang keputusan itu dan membuat satu rayuan kepada Mahkamah Rayuan. Defendan membuat permohonan untuk penggantungan prosiding sementara menunggu keputusan daripada rayuan. Permohonan untuk penggantungan prosiding tidak di buat kepada Mahkamah Tinggi di Mahkamah Rayuan sahaja. Isu pertama adalah sama ada permohonan yang asal boleh dilayan oleh Mahkamah Rayuan. Peguam bagi pihak pemohon berhujah bahawa mahkamah ini mempunyai bidang kuasa untuk mendengar permohonan tersebut menurut s 44 Akta Mahkamah Kehakiman 1964. Isu kedua adalah sama ada penggantungan prosiding sepatutnya dibenarkan.

Diputuskan, membenarkan permohonan untuk penggantungan prosiding:

(1) Berdasarkan susunan kata yang jelas dalam s 44(1) Akta Mahkamah Kehakiman 1964, mahkamah ini (iaitu Mahkamah Rayuan) mempunyai

autoriti untuk mendengar jenis permohonan ini. Satu rayuan menentang keputusan PK masih belum didengar oleh mahkamah ini. Ini merupakan permohonan interim sementara menunggu satu pembicaraan bagi rayuan defendan (lihat perenggan 6).

(2) Dalam satu permohonan bagi penggantungan prosiding pemohon hendaklah menunjukkan kewujudan keadaan-keadaan khas (lihat perenggan 12); *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 tidak diikut; *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 dan *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116 diikut.

(3) Kes ini jatuh di bawah kategori kehilangan kelayakan bukan-automatik. Oleh sebab itu terdapat keperluan untuk membuktikan bahawa kecenderungan berat sebelah wujud. Ia akan diputuskan secara objektif berdasarkan semua fakta dan situasi kes. Persoalan yang lebih penting adalah sama ada betul untuk hakim itu membuat keputusan sedangkan beliaulah yang disyaki berat sebelah. Apabila satu pihak mengesyaki hakim berat sebelah, dan hakim itu memutuskan bahawa diri sendiri tidak berat sebelah, keputusan ini telah melanggar peraturan keadilan asasi yang menyatakan '*one should not be a judge in one's own cause*'. Situasi ini jatuh di bawah lingkungan keadaan-keadan khas (lihat perenggan 13). Sekiranya penggantungan prosiding tidak dibenarkan dan PK dibenarkan mendengar perbicaraan kes ini, ia akan menyebabkan kerugian masa dan tenaga mereka yang terlibat jika Mahkamah Rayuan membenarkan rayuan itu kerana keseluruhan prosiding yang didengar oleh PK akan dibatalkan. Dalam situasi ini, adalah lebih wajar untuk membenarkan penggantungan prosiding sementara menunggu keputusan pembicaraan rayuan (lihat perenggan 14).]

Notes

For cases on application for stay of proceedings, see 2(3) *Mallal's Digest* (4thEd, 2001 Reissue) paras 5503–5513.

For stay of proceedings, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.06-076]–[10.6-081].

Cases referred to

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257 (folld)

Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 (refd)

See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (not folld)

Serangoon Garden Estate Ltd v Ang Keng [1953] MLJ 116 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 44
Legal Profession Act 1976 s 46A(1)(c)

Appeal from: Originating Summons No 24 –204 of 2002, High Court (Kota Bahru)

Subayogan Sinniah (Raja Aziz Addruse with him) (Zainal Abidin & Co) for the appellant.

Suraeisan ST Mani (Suraeisan ST Mani & Assoc) for the respondent.

Azmel J (delivering judgment of the court):

[1] This matter originated from the decision of the learned senior assistant registrar on an interlocutory matter against which both parties had lodged an appeal to the judge in chamber. However the learned judge, having realised that one of the material documents in the case was an agreement which he, in his previous capacity as the Kelantan state legal adviser was responsible for drafting, decided to recuse himself from hearing this case.

[2] Subsequently the learned Judicial Commissioner (JC) attached to the Kuantan High Court was administratively directed to hear this matter. However before the hearing commenced, the defendant applied for the learned JC to recuse himself from hearing this case. The main reason stated by the defendant for the application was that the learned JC was once the legal adviser for the United Malay National Organisation (UMNO) and had stood as UMNO candidate in the 1990 general election. Furthermore the learned JC had acted as counsel for UMNO in previous proceedings against Parti Islam Malaysia (PAS). Since the defendant is owned by the PAS-led Government of the State of Kelantan, there would be a possibility of bias if the learned JC were to hear the case.

[3] In the light of such application the learned JC requested both parties to submit on whether he should recuse himself from hearing the case. After having heard the submissions the learned JC ruled that there were no merits in the application. In his view if he were to accede to the defendant's application it would 'lead to a bizarre and ridiculous situation'. He therefore decided not to recuse himself from hearing the case as he completely believed he could conduct the case free of any bias whatsoever. Against that decision the defendant had lodged an appeal to this court. In the meantime before us the defendant/applicant applied by way of a notice of motion (encl 3a) for a stay of the proceedings of the said matter pending the decision of the appeal. The prayers that the defendant sought read:

(a) bahawa segala prosiding selanjutnya ke atas saman pemula No 24–204–2002 ini digantung sehingga rayuan kepada Mahkamah Rayuan oleh pihak defendan yang dibuat pada 16 Mei 2004 didengar dan diputuskan oleh Mahkamah Rayuan atas keputusan Mahkamah Tinggi yang dibuat pada 18 April 2004 berkenaan dengan kand 64;

(b) kos permohonan dijadikan kos dalam kausa;

(c) apa-apa relif atau arahan/perintah yang difikirkan munasabah dan adil oleh Mahkamah Yang Mulia ini.

[4] At the hearing before us it was admitted by the counsel for the defendant/applicant that they had not applied for stay of proceedings at the High Court. The application was made only at this court. The first question that we had to determine was whether this original application could be entertained by this court. The counsel for the applicant submitted that this court has the jurisdiction to hear this application by virtue of s 44 of the Courts of Judicature Act 1964.

[5] Section 44 of the Courts of Judicature Act 1964 ('the said Act') states:

(1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of the parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a judge of the Court of Appeal.

(2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.

(3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed varied or discharged by the court.

[6] Based on the clear wording of s 44(1) of the said Act we were fully satisfied that this court have the authority to entertain such application. An appeal against the decision of the learned JC is pending in this court. This is an interim application pending the hearing of the appeal. We therefore proceeded to hear the application before us which was whether the application for stay of the proceedings be granted or otherwise. It is however a well established principle of law that the power of the court to grant a stay is completely discretionary.

[7] In his grounds of judgment the learned JC had quite correctly stated that the law on disqualification (recuse) falls within two categories namely automatic disqualification and non-automatic disqualification.

[8] In the automatic disqualification category, a judge is obliged to recuse *sua sponte* eg where it is known or shown or brought to the judge's attention, that he has pecuniary or proprietary interest in the subject matter.

[9] The second category, the non-automatic disqualification, is where the judge is not automatically obliged to recuse. In this case the applicant must prove bias and the bias must be sufficient to affect the impartiality of the presiding judge. The instant case comes within this category of disqualification.

[10] It was the defendant's argument that the defendant company is owned by Perbadanan Menteri Besar Kelantan (PAS) and the plaintiff company is owned by Dato' Mohd Bakri bin Mohd. And the learned JC should recuse himself because:

(i) both Dato' Mohd Bakri Mohd and the learned JC were senior members of UMNO Kelantan;

(ii) Dato' Mohd Bakri is currently a senior personality in UMNO Kelantan and that he had not stated in his affidavit that he does not know the learned JC;

(iii) that the learned JC, prior to his elevation, was lead legal counsel and spokesmen for UMNO Kelantan and was perceived or could be perceived to be a duly authorised representative of UMNO.

[11] However, in insisting that there would be no likelihood of bias on his part, the learned JC disclosed the following facts to the counsels for both parties:

(a) that I did not hold any office in any political party since 1995, namely upon being elected as chairman of the Kelantan Bar Committee and subsequently as an office bearer of the Bar Council. Section 46A(1)(c) of the Legal Profession Act 1976 prohibits me from holding any office in any political party;

(b) that I stood as a candidate for UMNO in the 1990 General Election is a situation that goes back to some 14 years ago;

(c) that the so-called post of legal adviser of Kelantan UMNO is not a post or office within the party's constitution, and that in all cases I only acted as an advocate and solicitor for litigants who happened to be members of the party. I never acted for the party;

(d) that I do not have any idea or inhaling as to who are the personalities in either the plaintiff's or the defendant's companies;

(e) that I do not have any association, be it social or political or any relationship or even acquaintance with any directors or shareholder of the plaintiff company;

(f) that I have not met or even knew by sight or spoken to any director or shareholder of the plaintiff company;

(g) that I have no knowledge of the agreement or any agreement between the litigants, which is the subject matter of the case; and

(h) that my previous association with the said political party is already part of history, as in compliance with the Judges Code of Ethics, I ceased to be a member of any political party from the date of my appointment.

[12] It is now a well established principle that in an application for a stay of proceedings the applicant must show the existence of special circumstances. This principle was originally adopted in the case of *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116. The Court of Appeal in the case of *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 ruled that there is no need for the applicant to demonstrate special circumstances to warrant a stay of proceedings or of execution. However the recent Federal Court ruling in the case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 appears to have overruled the decision of *See Teow Guan* and reinstate the principle that was established in *Serangoon Garden Estate*whereby the applicant still requires to show special circumstances in an application for stay of proceedings of execution. We are therefore bound by the ruling of the Federal Court (see also the Court of Appeal decision in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49).

[13] As mentioned above, this case comes under the category of non-automatic disqualification. Hence the need to prove whether the element of bias exists. It has to be objectively decided, based on all the facts and circumstances of the case. But the more important question to be asked is whether it is proper for such decision to be made by the presiding judge against whom bias has been alleged? In other words, when a party alleges that a presiding judge is biased, and if the presiding judge himself decides he is not, would such decision not infringe the rule of natural justice in that 'one should not be a judge in one's own cause'. This, we think, is the crux of the instant case, even more so when the learned JC would have to decide the degree of bias that would be sufficient to affect his impartiality. In our judgment, this situation would come within the meaning of special circumstances.

[14] We have also taken into consideration the fact that in the event that a stay a proceedings was not granted and the learned JC be allowed to proceed with the hearing of this case, it would result in a waste of time and effort by all persons involved since if the Court of Appeal allows the appeal the whole proceedings conducted by the learned JC would have to be completely expunged. In the circumstances it would be more expedient to allow a stay of the proceedings until the hearing of the appeal has been completed.

[15] For the reasons stated above we unanimously allowed prayers (a) and (b) of encl 3a.

Application for stay allowed.

Reported by Loo Lai Mee